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woman. *Thomas v. Jones*, 2 G. & H. 475, 483; s. c. *De Gex, J. & S.* 63; *Airy v. Bower*, 12 App. Cas. 263, 268.

In the case of *Thomas v. Jones*, supra, Lord Chancellor Westbury, in discussing the question of the right of a married woman to exercise the power of appointment, said: "It is not necessary, however, that the authority should exist at the time of the execution of the instrument, if it be afterwards acquired and be subsisting at the time of the death of the testator."

If a married woman can exercise a power of appointment which does not exist when she makes her will, but which is given her before she dies, it seems to me, a fortiori, she can by will dispose of separate estate belonging to her at her death, although she did not own that or any other separate estate at the date of her will.

The decisions of this court in the cases of *Stroude v. Connelly*, 33 Grat. 221, and *Kiracofe v. Kiracofe*, 93 Va. 591, 25 S. E. 601, referred to by counsel, are not in conflict with this view, though there are some expressions in the opinions of the court in those cases which, standing alone, might seem to be. But the question we are now considering was not involved in those cases.

The only case which we have found which involved this precise question, and which was passed upon by this court, is the case of *Earl of Charlemont v. Spencer*, 11 Law Rep. Ireland, 347, 490, and it is in accord with the conclusion we have reached. In that case, in construing the English statute of wills (St. 1 Vict. c. 26), it was held that "the will of a married woman who has non-personal estate belonging to her, for her separate use, at the date of the will, made without the assent of her husband, is effectual to dispose of personal estate to her separate use, which she afterwards acquires and is entitled to at her death."

We are of opinion that there is no error in the decree appealed from, and that it should be affirmed.

PENNSYLVANIA R. CO. v. SMITH.

March 14, 1907.

[56 S. E. 567.]

1. Action—Nature—Contract or Tort.—In an action against a carrier, a declaration averring an undertaking for the carriage of a shipment of scrap iron and steel, and that in consideration of the delivery of said iron and steel the defendants issued three separate bills of lading, and undertook to carry said property to said destination, and to require the surrender of said bills of lading properly indorsed before the delivery, yet said defendants delivered the iron and

steel * * * without the surrender of said bills of lading properly indorsed, by reason of which disregard of their agreement, the said plaintiff has been greatly damaged, etc., was not a sufficient statement of a consideration to support defendant's promise, and hence stated a cause of action for tort, and not in contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Action, §§ 164-175.]

2. Same—Joinder of Causes of Action—Tort and Contract.—A count in tort cannot be joined with count in assumpsit, and hence where a declaration containing counts in assumpsit was amended by adding a count in tort, it was demurrable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Action, §§ 469-471.]

3. Appeal—Disposition of Cause—Reversal—Remand.—Where, on reversing a judgment overruling a demurrer to a declaration for joinder of a special count in tort with counts in assumpsit was apparent that it was intended by the pleader that the special count should be a count in assumpsit it was defective, it should be remanded, with instructions to sustain the demurrer, unless plaintiff should, on leave obtained, amend his declaration, and, if the declaration should be amended, for such further proceedings as might be proper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4616-4619.]

Appeal from Circuit Court of City of Richmond.

Action by one Smith against the Pennsylvania Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Allen G. Collins and *J. B. Walsh*, for appellant.

J. J. Leake and *Francis L. Smith*, for appellee.

WHITTLE, J. In addition to the common counts in assumpsit, the amended declaration in this case contains a special count, the material averments of which are as follows: That the defendants (who are the plaintiffs in error) were common carriers for hire and reward, and, as such, at their own risk and solicitation, received from the plaintiff three carloads of scrap iron and steel, which were consigned by the plaintiff at Richmond, Va., to his own order at Pittsburg, Pa., with direction to notify Kane-Maloney Iron & Steel Company, "and in consideration of the delivery to the said defendants * * * of said iron and steel to be so carried, the said defendants * * * issued three separate * * * bills of lading * * * and by said * * * bills of lading, undertook, promised, and agreed to carry said property to said destination and to require the surrender of said * * * bills of lading properly indorsed before the delivery of

said property at destination. * * * Yet the said defendants, unmindful of their duty, promise, and agreement * * * and disregarding the same, delivered * * * the iron and steel to the said Kane-Maloney Iron & Steel Company, or to some other person, without the surrender of said * * * bills of lading properly indorsed; by reason of which disregard of their duty, promise, and agreement, and such unwarranted delivery of said property, the said plaintiff has been greatly damaged," etc.

There was a demurrer to the amended declaration and each count thereof, which was overruled. Thereupon the trial proceeded, and at the close of the evidence the defendants demurred to the evidence, which demurrer the court likewise overruled, and rendered judgment against them for the damages conditionally assessed by the jury.

The recovery in the case (if there be a recovery) must be upon the special count, and our observations will therefore be addressed to its sufficiency.

The ground of demurrer chiefly relied on is that while the special count purports to be in assumpsit it is in reality in tort, and consequently cannot be joined with counts in assumpsit. 4 Min. Inst. (3d Ed.) pt. 1, pp. 446, 447; 1 Bar. Law Pr. (2d Ed.) p. 304; *Creel v. Brown*, 1 Rob. 281; *Hale v. Crow*, 9 Grat. 263; *Gary v. Abingdon Pub. Co.*, 94 Va. 775, 27 S. E. 595.

It is a principle of pleading that, where a plaintiff is entitled to two modes of redress, and elects to waive the tort, and sue in assumpsit, he must conform to the rules applicable to that form of action; and it is also an essential requirement in such case that, with the exception of actions founded upon bills of exchange, promissory notes, and other legal liabilities which import a consideration, the declaration must allege both a promise and the consideration upon which it is based. *Winston v. Francisco*, 2 Wash. 187; *Cooke v. Simms*, 2 Call, 39; *Sexton v. Holmes*, 3 Munf. 566; *Beverley v. Holmes*, 4 Munf. 95; *Moseley v. Jones*, 5 Munf. 23; *Wooddy v. Flournoy*, 6 Munf. 506; *Jackson v. Jackson*, 10 Leigh, 448. See monographic note on "Assumpsit" to *Kennaird v. Jones*, 9 Grat. (Va. R. Ann.) bottom pages 98, 99; *Southern Ry. Co. v. Wilcox*, 98 Va. 222, 35 S. E. 355.

In the last-named case it was held that "the want of statement of a consideration for a promise is a capital defect in the declaration, not to be supplied by intendment."

"A mere averment of a promise, or the use of the words 'undertook' or 'agreed,' does not constitute the declaration a declaration on contract. It is necessary to allege not only a promise or undertaking, but also a consideration therefor." 3 Ency. Pl. &

Pr. 822, citing *Smith v. Seward*, 3 Pa. 342; *Corbett v. Packington*, 6 B. & C. 268 (13 E. C. L. 170).

In *Smith v. Seward*, *supra*, the court said: "The law on the subject has been put on satisfactory ground by making the presence of an averment, not of promise only, but of consideration also, the criterion; for it is impossible to conceive of a promise without a consideration, any more than a consideration without a promise, as an available cause of action; and when a consideration is not laid, the word agreed, or undertook, or even the more formal word promised, must be treated as no more than inducement to the duty imposed by the common law."

The similarity of the declarations in the two cases renders the foregoing observations the more pertinent. In the Pennsylvania case, the declaration averred "an undertaking in consideration that the public should be conveyed by means of defendant's ferry, and for hire to receive and safely to convey, and that plaintiff learning said offer, did use the ferry and commit his horses to defendant, in consideration of an undertaking to convey, and that through the carelessness of defendant the horses were lost." This was held to be a declaration in tort.

So, "a complaint, in an action against a common carrier, alleging in general terms a breach of contract to carry safely certain articles of freight, but further alleging, particularly and specifically, that the defendant so negligently and carelessly conducted in regard to the same that they were greatly damaged, states a cause of action in tort. *Bowers v. Richmond, etc., R. Co.*, 107 N. C. 721, 12 S. E. 452." 3 *Ency. Pl. & Pr.* 822, note. See, also, *Whittenton Mfg. Co. v. M. & C. R. R. Co.* (C. C.) 21 Fed. 901; *Angell on Carriers*, § 439; *Itchinson on Carriers*, §§ 744, 749.

"So, also, if the plaintiff declares on a promise in writing, not under seal, to do some other thing than pay money, unless in this case the consideration is stated, the declaration will be defective." 1 *Bar. L. Pr.* (2d Ed.) p. 314; 4 *Min. Inst.* (3d Ed.) pt. 1, p. 697.

It is true that the special count in general terms designates the defendants as "common carriers for hire and reward," and avers that as such at their own risk and solicitation they "received" the junk in question "to be so carried"; but that was merely by way of recital, and does not constitute a sufficient statement of a consideration to support the defendants' promises. The averment must be direct and explicit, and not by way of inducement or preamble only. *Davison v. Ford*, 23 W. Va. 617; *Sexton v. Holmes*, *supra*.

For these reasons, we are of opinion that the circuit court

erred in overruling the demurrer to the special count of the amended declaration.

The judgment on the demurrer to the evidence must therefore be set aside, and the judgment overruling the demurrer to the special count reversed. And it being apparent that it was intended that the special count should be a count in assumpsit, and not in tort, but that, as a count in assumpsit, it is amenable to the objections indicated in this opinion, the case, upon the authority of *Creel v. Brown*, and *Hale v. Crow*, *supra*, must be remanded to the circuit court, with instructions to sustain the defendants' demurrer to the declaration. But, if the plaintiff shall apply for leave to amend the same, under the circumstances of the case, the circuit court shall allow such amendment; and, if the declaration be amended, such further proceedings shall be had as may be proper, on the present, and any other pleadings that may be offered by either party and admitted by the court. Otherwise, final judgment shall be rendered for the defendants on the demurrer.

Note.

"The statute, in authorizing the establishment of mills, scrupulously guards against the erection of them, when the health of the neighborhood might be annoyed thereby. It requires the jury to respond to that inquiry, and it prohibits the leave to build a mill where the health of the surrounding population will be endangered. Nay more; lest the jury might not anticipate such a consequence, it expressly provides, that no inquest under a writ of *ad quod damnum*, and no opinion or judgment of the court thereupon, shall bar any public prosecution or private action, which could have been had or maintained, other than prosecutions and actions for such injuries as were actually foreseen and estimated upon such inquest. If, then, the rebuilding of the dam should renew the nuisance, the right of public prosecution and of private action will be in full force." *Miller v. Trueheart*, 4 Leigh 569, opinion of President Tucker.

In *Miller v. Trueheart*, 4 Leigh 569, in which an injunction was sued out to enjoin the erection of a milldam, on the ground that the stagnation of the water in the millpond proved injurious to the health of the neighborhood, the court said that however difficult it may be to ascertain the causes of those diseases which are usually attributed to malaria, and however conflicting the opinion of the learned have been upon the subject, if the evidence establishes that the health of the complainant and his family is grievously annoyed and impaired by the milldam, it may be abated by a public prosecution, or a private action may also be sustained by the individual who has suffered special injury from the erection of it.

Injunction to Rebuilding of Dam.—In *Miller v. Trueheart*, 4 Leigh 569, a mill and milldam were erected in 1815, by leave of court, according to the statute concerning mills, etc.; the stagnation of the water in the millpond proved injurious to the health of the neighborhood; and one of the neighbors, thereby injured, brought an action against the mill owners, and recovered damages at law; about the time of this recovery, the milldam was carried away, and the

pond drained; and the mill owners, after the recovery, were proceeding to rebuild the milldam, proposing certain expedients to prevent the stagnation of the waters from being again injurious to the health of the neighborhood. It was held, that a court of chancery, upon a bill by the person who recovered the judgment at law against the mill owners, may and ought to interfere, and enjoin them from rebuilding the dam, unless it shall appear that the expedients proposed by the mill owners will be effectual to prevent the mischief in future, which ought to be ascertained by a jury upon an issue directed for the purpose.

Remedies.—Where a milldam is a public nuisance, it may be abated by a public prosecution, or a private action may be sustained by the individual who has suffered special injury from the erection of it. *Miller v. Trueheart*, 4 Leigh 569, citing Bacon Abr. Nuisances; *Regina v. Wigg*, 2 Ld. Raym. 1163; *Dimmett v. Eskridge*, 6 Munf. 308.

Allegation as to Location.—In an indictment for a public nuisance in damming up and stagnating the waters of a creek, whereby the air is corrupted and infected, and sends forth noisome and unwholesome smells, it is not sufficient to lay it to the common nuisance of "all the citizens of the commonwealth, not only residing and inhabiting there, but also going, returning, passing and repassing by the same," nor to the common nuisance "of all the citizens of the commonwealth," but to maintain a public prosecution for a nuisance, it is necessary to allege and prove that the obstructions placed in the creek produced a stagnation of the waters, and corrupted the air, in or near a public highway, or in some other place in which the public have a special interest. *Com. v. Webb*, 6 Rand. 726.

Description of Nuisance.—Indictment for a nuisance, caused by a certain mill and milldam, the property of the defendant, situate near to a common highway, without particular specification or description of the mill. Held, good and sufficient after verdict. *Stephen v. Com.*, 2 Leigh 759.

Laying the Venue.—An indictment for a nuisance caused by a certain mill and milldam, the property of the defendant, situated near a common highway, without expressly alleging that it is in the county wherein the indictment is found, is good and sufficient after verdict. *Stephen v. Com.*, 2 Leigh 759.

Conclusion of Indictment.—It will be seen that the indictment in the principal case conformed to the ruling of our supreme court in *Com. v. Faris*, 5 Rand. 691. In that case it was held, on demurrer, that an indictment for a nuisance caused by a milldam, which concluded "to the common nuisance of divers of the commonwealth's citizens" was not sufficient. It ought to be laid to the common nuisance "of all the citizens of the commonwealth residing in the neighborhood" or "of all the citizens, etc., residing, etc., and passing thereby." But on this point three judges dissented.